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Supreme Court, U.S.
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No. 96-1231

In The

Supreme Court of the United States

October Term, 1996

E.I. DUPONT DE NEMOURS and COMPANY,

Petitioner,

vs.

BARBARA R. SHERIDAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICI CURIAE* OF KARE 11, COMBINED COMMUNICATIONS CORP., AND GANNETT CO., INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

KARE 11, Combined Communications Corp., and Gannett Co., Inc. respectfully submit this brief as *amici curiae*. The written consents of the parties have been filed with the Clerk.

INTEREST OF THE *AMICI CURIAE*

KARE 11, Combined Communications Corp., and Gannett Co., Inc. (collectively referred to as "KARE") are petitioners on a petition for a writ of certiorari filed with this Court on April 4, 1997 as Docket No. 96-1571. In that petition, KARE seeks review of an en banc decision of the United States Court of Appeals for the Eighth Circuit rendered in an age discrimination case, in which the en banc Eighth Circuit decided the same issue as the en banc Third Circuit in this matter, and also decided a related question on jury instructions.

Because of the overlapping issues between KARE's petition and the petition filed by E.I. DuPont de Nemours & Co. (the "DuPont petition"), KARE files this *amici curiae* brief respectfully to suggest that the Court may wish to consider deferring its consideration of the DuPont petition until it can simultaneously consider the KARE petition. Additionally, KARE brings to the Court's attention the Eighth Circuit's en banc decision, which is relevant to the Court's consideration of the DuPont petition but was not cited in that petition or the *amicus curiae* brief filed by the Equal Employment Advisory Council

because the Eighth Circuit's en banc decision had not yet been released.

REASONS FOR DEFERRING CONSIDERATION OF THE DUPONT PETITION FOR CERTIORARI

KARE's petition was filed on April 4, 1997, but will likely not be distributed to the Court before its conference on the DuPont petition. KARE's petition seeks review of *Ryther v. KARE 11*, a divided en banc decision of the United States Court of Appeals for the Eighth Circuit dated March 6, 1997 and published at 1997 WL 94025 (8th Cir. March 6, 1997). A response by C. Thomas Ryther to the KARE petition is due May 4, 1997, which puts the KARE petition just a few weeks behind the DuPont petition on the Court's calendar. KARE's petition raises the same issue as the DuPont petition and also presents a related question concerning jury instructions for a discrimination case.

As DuPont's petition explains, the lower courts are deeply divided over how to interpret this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), when faced with motions for summary judgment or judgment as a matter of law. The circuits do not agree on whether *Hicks* means that a reasonable jury which finds the prima facie elements and simply rejects the employer's non-discriminatory reason for termination can *always* infer that plaintiff was a victim of intentional discrimination, or whether the court must still make sure that there is sufficient evidence of discrimination *on the basis of age* (or race, gender, etc.) to sustain a verdict. In

Ryther v. KARE 11, the en banc court of appeals upheld the district court's denial of KARE's motion for judgment as a matter of law even though plaintiff offered no evidence that age had anything to do with the determination made by the actual decisionmakers not to renew plaintiff's contract.

KARE's petition also raises the companion question of how courts should instruct juries on the proof required to show discrimination in light of the burden-shifting formula articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as most recently interpreted in *Hicks*. The en banc Eighth Circuit split evenly on whether the nation's leading treatise on jury instructions, E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Procedure* (hereinafter "Devitt & Blackmar"), recommends an instruction which so seriously misstates the burden of proof required in an age discrimination case that it would constitute reversible error to give that instruction. Six judges of the Eighth Circuit found that giving DeVitt & Blackmar's pattern instruction was reversible error; six judges concluded it was an accurate statement of the law. As described in KARE's petition, the circuits are divided over how to instruct juries in discrimination matters.

The pending KARE petition thus brings the en banc decision of the Eighth Circuit before this Court at the same time as the DuPont petition brings before it the en banc Third Circuit decision; the KARE petition also squarely presents the jury instruction question in addition to the question regarding the standard for judgment as a matter of law.

CONCLUSION

KARE respectfully requests that the Court consider deferring its consideration of the DuPont petition until it can also consider KARE's petition at the same conference.

Respectfully submitted,

Dated: April 15, 1997

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